The release broadly prohibited the employees from pursuing any "charges" or other claims "of any kind whatsoever, whether known or unknown, or whether previously asserted or unasserted, stated or unstated, arising out of, connected with, or related to, my employment and/or termination of my employment...or my transition to independent contractor status" under any law including ADEA, Title VII, ADA, ERISA and state discrimination laws. The plain language of the release prohibited the employee agents even from challenging the legality of the conversion program itself before the EEOC or otherwise. Like Ms. Isbell, nearly ninety percent (90%) of the employees agents ordered to sign the release before they could convert to independent contractor were over forty (40) years of age and nearly 2/3 of those were fifty (50) years old or older. Any employee agents who left Allstate as a result of the program were ineligible for one year for positions at the Customer Service Centers in insurance sales and service, jobs similar to that of insurance agent. As of December 31, 2002 seventy-six percent (76%) of the employees who filled the Customer Service Center jobs were under forty years old; the vast majority of these employees were in their twenties. By August 21, 2003 eighty–four percent of these new employees were under forty years old. And, in the end, more than ninety-five percent (95%) of the employee insurance agents left the company as a result of the conversion program.

There was evidence Allstate's forced conversion of aging employee agents was prompted by a belief people are not productive especially if they are over fifty (50) years old; the evidence revealed Allstate also believed an aging employee agent workforce would result in increasingly high health insurance costs. Hence Allstate's decision to force the conversion of employee agents to independent contractors.

On September 19, 2000 the EEOC issued its Determination the policy of requiring the employee agents to execute the release in order to work for Allstate as an exclusive agent constituted illegal retaliation. App. 73-74.

The EEOC determined an employee's refusal to sign the release constituted protected activity. App. 74.

On September 25, 2002 the District Court denied Ms. Isbell's motion for partial summary judgment on the issue of whether Allstate's program violated the OWBPA and was retaliatory in violation of the ADEA, Title VII, and ADA. App. 46. Instead, on March 28, 2003 the U.S. District Court for the Southern District of Illinois granted summary judgment to Allstate Insurance Company on those issues. App. 47. In its December 16, 2003 *Amended Memorandum and Order* the District Court granted summary judgment in favor of Allstate on Ms. Isbell's remaining claims and denied her motion for reconsideration of the District Court's September 25, 2002 and March 28, 2003 Orders. App. 17.

Ms. Isbell appealed the decision of the Southern District of Illinois to the Seventh Circuit Court of Appeals. The Seventh Circuit Court of Appeals affirmed the decision of the Southern District of Illinois and held Ms. Isbell "did not lose her job, because she refused to sign the release. She lost her job for the same reason 6,400 other employee agents of Allstate lost theirs...- because Allstate had decided to eliminate employee agent positions". App. 1, 7. The Court below characterized the forced conversion as akin to a benefit offered to a fired employee in exchange for a release. App. 7.

But Ms. Isbell does not suggest Allstate eliminated her employee agent position because she refused to sign the release. Except to dismiss it as "novel", the Court below does not address the issue Ms. Isbell raises, i.e., Allstate could not require her to refrain from protected activity as a condition of rehire or continued employment with the company whether as an independent contractor or employee. App. 7. By its silence on this issue the Court below allowed Allstate to condition an offer of rehire or continued employment albeit under a new job title and different compensation upon execution of an agreement not to engage in protected activity. App. 7.

The Seventh Circuit Court of Appeals subsequently denied a petition for rehearing or rehearing *en banc* filed by Petitioner Doris Isbell. App. 72.

REASONS FOR GRANTING OF THE PETITION

A. The Decision in the Court Below Undermines Decisions of This Court That Broadly Interpret the Anti-Retaliation Provisions of the ADEA, Title VII and ADA and Creates a Split Between the Circuits.

Contrary to the decisions of the U.S. Supreme Court and other U.S. Courts of Appeals including earlier opinions by the Seventh Circuit Court of Appeals, the opinion of the Court below has sharply limited the reach of the anti-retaliation laws. The Court below allows an employer to refuse to rehire or continue employment unless an employee agrees to refrain from protected activity.

In contrast to the opinion of the Court below, this Court has required a broad interpretation of anti-retaliation provisions to ensure "unfettered access to statutory remedial mechanisms" is maintained. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). See also *EEOC v. Waffle House*, 534 S. Ct. 279, 296 n.11 (2002).

Indeed, the opinion below conflicts directly with *Romero v. Allstate Insurance Company*, No. 01-3894 (E.D. Pa. 2004) rev on other grds, *Romero v. Allstate Corp.*, 404 F.3d 212 (3rd Cir. 2005). App. 63. In that case, like the EEOC in its September 19, 2000 Determination, the court found this same Allstate release violated the anti-retaliation provisions of the ADEA, Title VII, and ADA. The Court was adamant, "[I]t is illegal to either retaliate, or threaten to retaliate, against an employee to prevent him from exercising rights under the EEOC, Title VII, ADEA, ADA, etc. Those employees who did not sign releases were in fact treated less favorably than those who did sign, and the signers had all

been threatened with such an outcome if they exercised their right to refuse to sign the proposed release." App. 67.

Those employee agents who refused to sign the release, like Ms. Isbell, were not allowed to continue their careers selling insurance at Allstate. Allstate conditioned their employment, whether it is described as a rehire or continued employment, on their agreement to refrain from anticipated protected activity. There was no other requirement for rehire or continued employment under the new contract.

The opinion below also directly conflicts with the Tenth Circuit decision in *Sauers v. Salt Lake County*, 1 F. 3d 1122, 1128 (10th Cir. 1993). There, the Court held "[a]ction taken against an individual in anticipation of that person engaging in protected opposition to discrimination is no less retaliatory than action taken after the fact". Allstate has done exactly this – taken action against Ms. Isbell in anticipation she would engage in protected activity. Allstate wanted to prevent her from challenging its termination of the employee agents and forced conversion. To do so, it conditioned her rehire or continuation of her career there on signing the release of Allstate from all liability. There was no other condition to her rehire or conversion to independent contractor. Except to prevent her from engaging in anticipated protected activity, there is no other reason Allstate would have required Ms. Isbell to sign the release prior to continuing her career there.

Indeed, the opinion of the Court below also conflicts with decisions in which in similar contexts other U.S. Courts of Appeals have recognized it is retaliatory for an employer to condition rehire or continued employment on execution of a release. See *Marshall v. Parking Co. of America-Denver*, 670 F. 2d 141, 142 (10th Cir. 1982)(A threat to fire employees for refusing to release claims for overtime pay violates the Fair Labor Standards Act's anti-retaliation provisions.) The Court in *Brock of Casey Truck Sales*, 839 F. 2d 872, 879 (2nd Cir. 1988) observed, "Protection against discrimination for

instituting FLSA proceedings would be worthless if an employee could be fired for declining to give up the benefits he is due under the Act."

In the context of the National Labor Relations Act, 29 U.S.C. §158(a) ("NLRA") courts have found improper coercion when employers condition reinstatement or rehire on an agreement to drop grievances. Compare *NLRB v. St. Mary's Sewer Pipe Co.*, 146 F.2d 995, 996 (3rd Cir. 1945); *A&D Davenport Tran., Inc.*, 256 NLRB 463, 463 n. 2, 467 (1981) enforced, 688 F. 2d 844 (7th Cir. 1982). (The ADA's anti-coercion provision, 42 U.S.C. § 12203(b), contains language similar to that found in the NLRA; courts have looked to the NLRA as an aid in interpreting this unique provision. See, e.g., *Fogelman v. Mercy Hosp., Inc.*, 283 F.3d 561, 567, 569, 570 (3rd Cir. 2002) cert. denied 537 U.S. 824 (2002).)

In an analogous context, this Court has held an employer cannot establish a failure to mitigate damages when an employee refuses to accept a job that is conditioned on a release of claims against the employer. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 232 n.18 (1982). See similarly, *Curl v. Reavis*, 740 F. 2d 1323, 1331 (4th Cir. 1984).

Even earlier decisions of the Seventh Circuit Court of Appeals are in conflict with the opinion below. Contrary to the decision in *Veprinsky v. Flour Daniel, Inc.*, 87 F.3d 881, 888 (7th Cir. 1996), the Court below allowed Allstate to condition rehire or continuing employment on an agreement to refrain from protected activity.

It should be noted the Courts below focused on the termination of the employment contracts and not the offers of conversion to independent contractor in deciding the retaliation claim. The Courts below found the offers of rehire or continued employment were akin to severance or benefits offered along with a termination of employment and for which the employer can demand a release of liability. But employee agents were not, as the Courts below suggest, provided severance or benefits as consideration for signing a

release of liability for their termination. Instead, their rehire or continued employment was contingent on an agreement not to engage in protected activity.

The Courts below also focused on the timing of Ms. Isbell's protected activity in reaching their decisions. The Courts below pointed out she did not complain of age discrimination or file an EEOC charge until after she learned of the plan to terminate her employment contract; thus, reasoned the Courts below, there was no retaliation. But the point is Allstate conditioned her rehire or continued employment on her execution of a release. Ms. Isbell and any other employee agent who refused to sign the release could not continue to work for Allstate as insurance agents under the new contract. It was not the termination of the old contract that was retaliatory; it was the refusal to hire Ms. Isbell under the new contract unless she agreed to refrain from engaging in protected activity. Once she refused to sign the release, the offer of a new contract was withdrawn. It is difficult to imagine this adverse employment action does not violate the anti-retaliation provisions of the ADEA, Title VII, and ADA's broad proscription against any act which "coerce[s], intimidate[s], threaten[s], or interfere[s] with any individual in the exercise or enjoyment of" rights under the Act. 42 U.S.C. §12203(b).

If an employer is allowed to require employees to release civil rights for rehire or to continue employment, there is nothing, then, that would prevent an employer from having employees sign releases every so often to continue in their jobs. In this way employers could vitiate entirely the statutory protections for employees under the civil rights laws. Their jobs would depend on their signing away their rights under such laws. This is exactly the kind of retaliatory effect the anti-retaliation statutes seek to prevent. 29 USC §623(d); 42 USC §2000e-3(a) and 42 USC §12203.

The opinion of the Court below also conflicts with decisions concerning the definition of "protected activity" under the anti-retaliation statutes. Note *McDonnell v. Cisneros*, 84 F. 3d 256, 262 (7th Cir. 1996). In that case the

employee failed to stop his subordinate from filing discrimination charges against another manager; he did not help his subordinate, but he did not stop him. His passivity was determined to be protected activity.

Doris Isbell was far more active in engaging in protected activity. She refused to sign the release. And, Ms. Isbell wrote Allstate to advise she would continue her job under the new exclusive agent arrangement, but she would not sign the release, that she believed the conversion program constituted age discrimination. App. Her refusal to sign the release could serve no other purpose than to allow her to engage in protected activity. Ms. Isbell then filed a Charge of Discrimination. She was denied the exclusive agent position only because she refused to refrain from engaging in protected activity.

Note the Second Circuit Court of Appeals affirmed the decision in *Cronin v. ITT Corp.*, 737 F. Supp. 224, 225-227, 231 (S.D.N.Y. 1990) *aff'd.* 916 F.2d 709 (2d Cir. 1990). In that case the Court accepted a refusal to sign a release was protected activity; the employee in that case alleged, in part, the employer tried to prevent him from obtaining another job because he refused to sign a release.

B. The Court of Appeals' Decision Conflicts With and Undermines this Court's Decision in *Hishon v. Spalding.*

The opinion of the Court below conflicts with the decision of this Court, *Hishon v. King & Spalding*, 467 U.S. 69 (1984). In that case the employer law firm allegedly discriminated on the basis of sex in considering associate attorneys for partnership. Once they were partners, the law firm assumed associates ceased being employees and were no longer protected by Title VII. Nevertheless, this Court held the firm could not discriminate in how it considered its associates for partnership. *Id.* 467 U.S. at 75. This Court made clear an employer cannot "dole[] out in discriminatory fashion" "[a] benefit that is part and parcel of the

employment relationship". *Id.* "Those benefits that comprise the 'incidents of employment[]' ... or that form 'an aspect of the relationship between the employer and employees,' may not be afforded in a manner contrary to Title VII." *Id.* 467 U.S. at 75-76.

Likewise here, Allstate was not free to offer this privilege of employment of exclusive agency in a way that violated federal law. Clearly, Allstate could not offer its exclusive agent contract under the conversion program to male agents but not female agents. For the same reason, it could not withhold the offer from agents who refused to relinquish their rights to engage in protected activities.

It is difficult to see how conversion to an exclusive agent was not at least a privilege, an "'incident[]'" or an "'aspect' of the relationship to employer and employee". *Id.* Allstate had for years made clear to Ms. Isbell she had the option of converting at any time to exclusive agent status. And, again, Allstate had never before required such a release. The November, 1999 offer of forced conversion was made to Ms. Isbell because she was an employee; the only condition required for conversion was that she sign the release. Surely, if a promise to consider an employee for partnership is a privilege, "'incident[]'" or "'aspect'" of employment, then so is a firm offer to allow conversion to exclusive agent that was contingent only on execution of an agreement not to engage in protected activity. *Id.* It does not matter Allstate could have chosen not to make the offer of conversion; once it did so, according to *Hishon*, it could not withhold the opportunity from those who refused to sign the release. *Id.*

Yet, the Court below has decided contrary to *Hishon*, an employer is now free to "dole[] out" privileges, "'incidents'" or "'aspect[s]'" of employment in a retaliatory manner.

C. The Court of Appeals' Decision Conflicts With the Requisites of the OWPBA and Decisions of Other Courts of Appeals Interpreting the OWPBA.

The OWBPA is explicit that "[n]o waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission." 29 USC §626(f)(4). See further *EEOC v. Cosmair, Inc.*, 821 F. 2d 1085, 1090 (5th Cir. 1987) in which the Court was explicit "a waiver of the right to file a charge [with the EEOC] is void as against public policy."

In contrast, the Court below upheld Allstate's demand its agents including Ms. Isbell "release, waive and forever discharge" any right to bring any "charge", claim or suit for violation of their rights, in part, under ADEA, Title VII, ADA, and ERISA. There is no indication an employee can pursue a charge with the EEOC; in fact, the release specifically states an employee is barred from bringing a "charge".

Employee agents like Ms. Isbell who refused to give up their rights lost their careers; they could not work for Allstate as exclusive agents. Note that in *Romero v. Allstate*, No. 01-7042 (E.D. Pa. 2004) *rev. on other grds, Romero v. Allstate Corp.*, 404 F.3d 212 (3rd Cir. 2005), the Court found this same Allstate release was voidable because by its terms it purported to require agents to release any right to bring charges before the EEOC. App. The Court in that case found this release on its face violated the OWBPA, 29 USC §626(f)(4) because it prohibited employee agents from filing "charge[s]" or at least led them to believe they could not do so. App. 67. Ms. Isbell should not have been denied rehire or conversion to independent contractor because she refused to sign an illegal release.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Dated this 9th day of January, 2006.

Respectfully submitted,

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Supreme Court, U.S.
FILED
05 1010 JAN 9 - 2006
OFFICE OF THE CLERK

No.

IN THE SUPREME COURT of the UNITED STATES

Doris Isbell, Petitioner

v.

Allstate Insurance Company, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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DORIS ISBELL and JAMES SCHNEIDER, Plaintiffs-Appellants, v. ALLSTATE INSURANCE COMPANY, Defendant-Appellee.

Nos. 04-2310 & 04-2365

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

418 F.3d 788

August 15, 2005, Decided

Judges: Before CUDAHY, MANION, and EVANS, Circuit Judges.

OPINION BY: MANION

OPINION: [*790] MANION, *Circuit Judge*. Doris Isbell and James Schneider are former employees of Allstate Insurance Company ("Allstate" or, the "Company"). After Allstate reorganized its workforce and abolished their positions with the company, the two sued Allstate in the United States District Court for the Southern District of Illinois. The suit alleged (among other things) claims of discrimination and retaliatory discharge. The district court granted summary judgment in favor of Allstate with respect to all of these claims, and in favor of Schneider with respect to Allstate's assertion of damages for its claim of breach of a contract by Schneider. We affirm the district court's summary judgment in favor of Allstate on Isbell's claims. We also hold, however, that Schneider did not breach his contract with Allstate and thus reverse the district court's grant of summary judgment in favor of Allstate on that claim.

I.

In November 1999, Allstate announced a company-wide plan to change the nature of its business relationship with a significant [*791] number of the people who sold insurance for it. The basic idea was that Allstate would no longer sell insurance through employees, known here as "employee agents," but would do so instead through a network of exclusive independent contractors.n1 To accomplish this conversion, the company decided to terminate, effective June 30, 2000, all of its approximately 6,400 employee agents -- regardless of age, productivity, or performance.

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n1The actual division of Allstate's sales force prior to the reorganization was somewhat more complicated than we have presented it here. There were, apparently, six types of contractual relationships between Allstate and its sales force (Schneider and Isbell each had a different class of contract with Allstate). In fact, one of the reasons Allstate cites for its reorganization decision was to cut down on the costs of administering these diverse relationships.

For our purposes, however, it is sufficient to say that prior to the reorganization there were two broad categories of insurance salespersons for the Company: independent contractors and employee agents. The goal of the reorganization was to make all of the Company's sales force independent contractors.

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Allstate did not, necessarily, seek to completely end its relationship with the terminated employee agents. Allstate offered each of the 6,400 employee agents, including Isbell and Schneider, four options. The first two of these options

allowed an employee to enter into an independent contractor relationship with Allstate. Both options would grant the new contractors the opportunity to have an economic interest in the book of business they wrote for the company as well as certain other benefits, including a $ 5,000 bonus and the forgiveness of certain office expense advancements. The first option ("Option One) envisioned a long-term relationship with the new contractor and the Company, while the second option ("Option Two") foresaw a transitory relationship between the contractor and the Company -- the expectation was that the new contractor would sell his or her book of business to an approved buyer (presumably another Allstate contractor) and then leave the Company. The third option ("Option Three") was that the employee could terminate its relationship with Allstate and receive a year's pay as severance. The fourth option ("Option Four") also included an immediate end to the parties' business relationship and a simple severance pay-out for up to thirteen weeks' salary.

The first three options offered by Allstate required the terminated employee to sign a release (the "Release") that purported to waive any claim that an employee might have against Allstate under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621 et seq. (the "ADEA"), Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. ("Title VII"), the Americans with Disabilities Act, 42 U.S.C. §§12101 et seq., (the "ADA"), and the Employment Retirement Income Security Act of 1974, 29 U.S.C. §§1140 et seq. ("ERISA"). The Fourth Option did not require the terminated employee to sign the Release. Thus, the key difference between Options Three and Four was that in order to receive a year's severance pay an employee had to sign the Release. If an employee refused to sign the Release he was entitled to the much briefer period of severance but retained the right to bring suit against Allstate for any claims he might have under the aforementioned statutes.

Allstate gave each affected employee (including Isbell and Schneider) a copy of the Release and information explaining the implications [*792] of signing (and not signing) the Release. Allstate also encouraged each employee to consult an attorney before signing the Release.

Isbell and Schneider were both informed of the termination decision in an employee meeting held by Allstate in Collinsville, Illinois sometime in November or December 1999 (the record is not clear as to precisely when, but there is no doubt that the two knew of their pending termination no later than December 1999). In the meeting, employees were told they would be fired in approximately six months and the four options set forth above were explained. Isbell and Schneider have both admitted that they knew that their particular terminations were part of this program, that they were not singled out for termination, and that they would be terminated from their current positions regardless of whether they signed the Release.

Schneider signed the Release and chose Option Two after meeting with an attorney who actually recommended that Schneider *not* sign the release. By taking Option Two, Schneider was given an economic interest in his book of business which he subsequently sold to another Allstate contractor for $ 120,000. Schneider also was given the $ 5,000 bonus and was forgiven a $ 1,000 debt with the company. Schneider admits that Allstate complied with its end of the bargain in all respects. Nevertheless, on December 14, 2000, Schneider filed an EEOC charge alleging age discrimination and retaliation.

Isbell did not sign the Release. At first, she was inclined to remain with the company as an independent contractor but did not want to have to do so at the cost of signing the Release. Because this was not possible she chose to leave the

Company. Allstate paid her the severance she was entitled to under Option Four. Before she left, however, in May 2000, she filed a claim of age discrimination and retaliation with the EEOC.

Isbell and Schneider ultimately filed the present suit. Both made claims of retaliation in violation of the ADEA, Title VII, the ADA, and ERISA, discrimination in violation of the ADEA, and unlawful termination to prevent the use of pension benefits -- an ERISA claim. Isbell also raised a claim of retaliation in violation of state law. Allstate filed a counterclaim against Schneider (but not Isbell) for breach of contract (the Release) and unjust enrichment. The district court consolidated the cases and the parties conducted discovery.

On February 19, 2002, Isbell moved for partial summary judgment on her claims of retaliation. Allstate filed a cross-motion for summary judgment in its favor. The district court ultimately denied Isbell's motion and granted Allstate's.

At the conclusion of discovery Allstate moved for summary judgment on the remainder of Isbell's claims, all of Schneider's claims, and its counterclaim against Schneider. On November 25, 2003, the district court granted Allstate's motion as to Schneider's breach of the Release. The district court ultimately ruled in favor of Schneider with respect to damages, finding that, although Schneider had breached his contract with Allstate, Allstate had shown no damages from the breach.

After the district court entered a final judgment, Isbell filed this appeal from the district court's entry of judgment on her retaliation, discrimination, and ERISA claims while Allstate has appealed the district court's denial of damages in its counterclaim against Schneider. Schneider has not appealed the decision denying his claims and he is a party to this

appeal only as a cross-appellee in Allstate's appeal.

[*793] II.

As we have just noted, Isbell and Allstate each appeal adverse rulings by the district court. We discuss each in turn.

A. Isbell's Appeal

Isbell appeals the district court's decisions to grant summary judgment in favor of Allstate on her claims of retaliation, discrimination, and violation of §510 of ERISA. We review a district court's grant of summary judgment de novo. *Jordan v. City of Gary, Ind.*, 396 F. 3rd 825, 831 (7th Cir. 2005). "Summary judgment is only appropriate where 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Id.* (quoting *Fed. R. Civ. P. 56(c)).*

1. Isbell's retaliation claim.

As with other employment-related claims (discrimination for instance), a plaintiff may proceed with a claim of retaliation pursuant to either the direct or indirect method. *Luckie v. Ameritech*, 389 F. 3d 708, 714 (7th Cir. 2004). In this case, however, because Isbell has offered no evidence of retaliation under the direct method, we proceed to the indirect method. This method requires Isbell to show: "(1) she engaged in statutorily protected activity; (2) she was performing her job according to [Allstate's] legitimate expectations; (3) despite her satisfactory performance, she suffered an adverse employment action; and (4) she was treated less favorably than similarly situated employees who did not engage in statutorily protected activity." *Id.*

Given the standard we have just recited, Isbell appears to throw in the towel when she admits in her opening brief to this court that "her employment was [not] terminated in retaliation for protected activity." Instead, Isbell advances a novel theory of retaliation, claiming that Allstate retaliated against her when it refused her "the opportunity to work for Allstate albeit under a different contract unless she signed the release." Isbell thus argues that Allstate could not require her to sign the Release as a condition to becoming an independent contractor with the Company.

Isbell was not a victim of retaliation. Her reason for termination was the same for all employees at Allstate who were similarly situated. She had four options. Three of those options had various incentives and benefits in exchange for the release. In order to be valid, a release, like all agreements, must be supported by consideration. *See, e.g.*, 29 U.S.C. §626(f)(1)(D)(stating that for a release to be valid under the Older Workers Benefits Protection Act, a release must be supported by consideration). An employee who refuses to sign a release will not be offered the same deal as a terminated employee who is willing to sign the release.

It is also clear that Isbell did not lose her job, because she refused to sign the Release. She lost her job for the same reason 6,400 other employee agents of Allstate lost theirs, *including those who signed the Release* -- because Allstate had decided to eliminate all employee agent positions with the Company. Isbell's fellow plaintiff Schneider signed the Release, yet he too lost his job as an employee agent. The district court did not err in granting summary judgment in Allstate's favor on Isbell's claim of retaliation.

2. Isbell's ADEA discrimination claim.

Pursuant to the ADEA, it is unlawful for an employer "to fail or refuse to hire or to [*794] discharge any individual or

otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. §623(a)(1). Like other similar claims, a plaintiff raising a claim of age discrimination may proceed by either the direct or indirect method. *Rhodes v. Ill. Dept. of Transp.*, 359 F. 3d 498, 504 (7th Cir. 2004); *Balderston v. Fairbanks Morse Engine Div. of Coltec Indus.*, 328 F. 3d 309, 321 (7th Cir. 2003). Isbell has chosen the direct method.

A plaintiff utilizing the direct method may rely on either direct or circumstantial evidence. *Rhodes*, 359 F.3d at 504. As this court has noted, direct evidence of age discrimination (or any other form of discrimination for that matter) essentially requires an admission by an employer or some sort of "smoking gun" that points to discrimination. *Jordan*, 396 F.3d at 832; *Chiaramonte v. Fashion Bed Group, Inc.*, 129 F.3d 391, 397 (7th Cir. 1997). There was no such admission or smoking gun here.

Circumstantial evidence under the direct method is sufficient to show discriminatory intent only where the plaintiff can "construct[] a 'convincing mosaic' of circumstantial evidence that 'allows a jury to infer intentional discrimination by the decision-maker.' " *Rhodes*, 359 F.3d at 504 (quoting *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 737 (7th Cir. 1994)). The evidence must, however, "point directly to a discriminatory reason for the employer's action." *Id.* (quoting *Adams v. Wal-Mart Stores, Inc.*, 324 F.3d 935, 939 (7th Cir. 2003)).

Isbell presents evidence from a series of studies conducted by Allstate, or on its behalf by consultants, that Isbell claims show that the Company believed younger agents performed better than older agents. The first study cited by Isbell was conducted by the Company in mid-1996, three and one-half years prior to the revamping of Allstate's workforce. The

results of that study were compiled in a Powerpoint n2presentation and shared with the Allstate's then-Chairman/CEO and its COO. The primary focus of the study and the ultimate conclusion appears to be that independent contractors outperformed employee agents; a conclusion that appears to foreshadow Allstate's ultimate decision to eliminate the employee-agent position and move to an all-independent contractor model of business.

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n2 Powerpoint is a computer program that allows for the construction of "slide shows," often using graphics and other devices (tables, charts, etc.) to present a report in summary fashion. The slide shows can be printed out and distributed on paper, displayed on a computer, or projected onto a screen (as in a board meeting).

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The presentation did note, however, some information concerning the age of agents which Isbell considers evidence of an intent to discriminate. The study showed the distribution of agents by tenure and average age and also noted that over 15% of the Company's agent force could retire in the next fifteen years. The study also suggested that "there is a potential generational mismatch between our agents and the new customers we seek." It noted that "productivity declines slightly by the age of the agent." The study also found, however, that "production by agent type remains constant, no matter what the agent age cohort." In other words, independent contractors had approximately the same production level regardless of the age grouping -- thirty to thirty-nine-year-old independent contractors had the same production level as forty-five to forty-nine year-old

independent [*795] contractors and likewise for employee agents. n3

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n3 Without too much analysis (we are not privy to the underlying data that went into these studies), this would suggest a fairly innocuous reason for the statement that production for agents declined slightly by the age of an agent. The independent contractors outperformed their employee-agent counterparts and the independent contractor program was concentrated amongst the relatively younger employees (the program was relatively new in 1996). Thus, the decline in production numbers for all agents as they aged could be attributable to the concentration of the better performing agent types in the younger age groups. Thus, while a forty-nine year-old agent, on average, could be expected to perform as well as a thirty-year-old agent of the same type, there were more agents from the poorer performing agent types in the higher age brackets than there were better performing agent types.

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The second study relied on by Isbell was a study, known as the Sale Organization of the Future (the "SOOF"), prepared for the Company in 1997 by an outside consultant. The SOOF study was much more concerned with the age of the Company's employee agents than the 1996 study. The SOOF included a presentation of agent demographics that highlighted the age distribution of the Company's agents and explored the options for eliminating the employee-agent role in the agent workforce.

Isbell also cites a 1999 study conducted by Allstate that